**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| Frank Jarvis Atwood,<br><br>Petitioner,<br>v.<br><br>David Shinn,<br><br>Respondent. | No. 22-70084 |

# REPLY IN SUPPORT OF MOTION FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER A SECOND OR SUCCESSIVE HABEAS PETITION BY A PRISONER IN STATE CUSTODY

JOSEPH J. PERKOVICH, ESQ.
NY Bar No. 4481776
Phillips Black, Inc.
PO Box 4544
New York, NY 10163
Tel: (212) 400-1660
j.perkovich@phillipsblack.org

AMY P. KNIGHT, ESQ.
AZ Bar No. 031374
Knight Law Firm, PC
3849 E Broadway Blvd, #288
Tucson, AZ 85716-5407
Tel: (520) 878-8849
amy@amyknightlaw.com

Attorneys for Petitioner

The State's response makes several crucial errors. It insists AEDPA silently eliminated *Sawyer*'s equitable exception to the successive petition bar, even though courts have repeatedly recognized that the equitable exceptions survive except where the text of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) is clearly incompatible with them. It misses the significance of the illegally withheld evidence in independently linking the alternate suspect to the case. And it relies on the strength of the evidence it presented at trial over 30 years ago in a vacuum, despite the fact that the reliability of that evidence was questionable from the start and has substantially eroded in the intervening years.

Invalid Aggravating Factor/Death Ineligibility

The State's argument that *Sawyer* can no longer apply after AEDPA fails. First, it asserts there can be no equitable exception because the statute directs that claims in successive petitions "shall be dismissed" unless satisfying § 2244(b)(2). But that is what "exception" means. The State's argument amounts to a claim that AEDPA cannot accommodate equitable exceptions, a position foreclosed by the Supreme Court's recognition of exactly such a surviving exception to an equally facially comprehensive statutory bar in *McQuiggin v. Perkins,* 569 U.S. 383 (2013)—a case the State fails to acknowledge. In *McQuiggin,* the Supreme Court held that the pre-AEDPA actual-innocence equitable exception to procedural bars could excuse a petitioner's failure to file his claim in a timely manner, even though

AEDPA explicitly imposes, also in § 2244, a 1-year limitations period, without providing any exceptions. That does away with the argument that there can be no exception because the face of the statute does not provide one.

Next, the State insists it would be perfectly rational to permit the execution of the ineligible, but not the imprisonment of the innocent, characterizing ineligibility for the death penalty as merely a "reduction in sentence." That assertion ignores the Supreme Court's death penalty jurisprudence: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). Mr. Atwood is not seeking a reduction in the length of his sentence; he is seeking not to be put to death by a state that lacks the constitutional authority. That is objectively more serious than a state imprisoning someone it should not.

Finally, it ignores the logic of this Court's prior key case about the survival of pre-AEDPA equitable exceptions, *Gage v. Chappell,* 793 F.3d 1159 (9th Cir. 2015), which the State also neglects to discuss. As this Court explained, an equitable exception "survives the enactment of AEDPA in certain instances and provides a gateway past *some* of the AEDPA's procedural retractions." *Id.* at 1167 (emphasis original). In sorting out where the exception does and does not survive,

this Court distinguished between statutory provisions that encompass a new version of the prior exceptions and those that do not. Specifically, in enacting § 2244(b), Congress took the factual innocence gateway that already existed and imposed harsher standards on it.[1] Because a petitioner satisfying § 2244(b)(2) would always satisfy *Schlup,* and *Schlup* would also allow some claims that the statute excluded, applying both would have rendered (b)(2) meaningless. *Id.*

That analysis produces a very different result for death-ineligibility claims. Section 2244(b)(2) and *Schlup* address exactly the same thing: innocence of the underlying offense. It thus makes sense that § 2244(b)(2) would replace, rather than co-exist with, *Schlup.* But § 2244(b)(2) is limited to claims of factual innocence, which the Supreme Court specifically carved off as distinct from death ineligibility claims when it created the gentler *Schlup* standard. *Schlup*'s entire premise is that what is true of death ineligibility claims is not necessarily true of factual innocence claims, and vice versa. That explicit distinction predates AEDPA, and this Court can presume if Congress had meant to address both, it would have invoked both.

[1] Pre-AEDPA caselaw said otherwise-barred constitutional claims could be heard on a "more likely than not" showing that no reasonable juror would have convicted the petitioner of the crime, *Schlup v. Delo,* 513 U.S. 298 (1995), and in § 2244(b), Congress said first, the petitioner had to meet a diligence requirement, and second, the required showing had to meet the more stringent "clear and convincing" standard." *Gage,* 793 F.3d at 1168.

Similarly, while applying *Schlup* and § 2244(b)(2) at the same time would completely wash out § 2244(b)(2), no such conflict arises in death-ineligibility claims. Continuing to allow such claims, under the clear and convincing standard that has always applied to them, would not affect § 2244(b)'s power to restrict factual innocence claims. AEDPA says nothing about cases where "no reasonable juror would have found [the petitioner] eligible for the death penalty." *Sawyer v. Whitley,,* 505 U.S. 333, 350 (1992). The statute cannot supplant the standard for a claim it does not address. Thus, like the limitations period defined in § 2244(d), there is no conflict between the existing rule and the new statute. This is *McQuiggin,* not *Gage.*

The State's only other argument is that Mr. Atwood should not get the benefit of the exception because he has no good reason for not presenting the claim earlier. But again, that is what makes the *Sawyer* rule an exception. This situation arose from the unfortunate fact that no lawyer for Mr. Atwood or reviewing court previously recognized this problem. The claim was presented in state court more than a year before the State first sought an execution warrant. Moreover, Mr. Atwood stipulated to an expedited briefing schedule during that initial proceeding to avoid any unnecessary delays in the adjudication of this claim. This is not, as the State has groundlessly asserted, a claim intentionally saved for the eve of execution.

*Brady*: Diligence

The State claims Mr. Atwood was not diligent in obtaining the exculpatory memorandum it had an affirmative duty to provide that was contained only in its own voluminous files because it was discovered in a file review that was requested, and occurred, many years after the trial. That is tantamount to saying Mr. Atwood had a duty not to believe the State when it claimed to have complied with its *Brady* obligations, including specifically agreeing it would provide its file of tips.[2, 3] That is not the law. *See Amado v. Gonzalez,* 758 F.3d 1119, 1136 (9th Cir. 2014) ("[D]efense counsel may rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce."); *see also Brown v. Muniz,* 889 F.3d 661, 674 (9th Cir. 2018) (State conceded diligence where it disclosed withheld files a decade later). This Court need not decide the ultimate question of diligence; Mr. Atwood has made a more than sufficient showing of "possible merit."

[2] As early as November 25, 1985 (approximately six months post-indictment and over a year before trial), Mr. Atwood's counsel specifically asked the State to disclose tips it had received that could either implicate or exculpate Mr. Atwood, explicitly invoking *Brady*. The State disclaimed a duty to identify tips implicating alternate suspects, but ultimately, it agreed to provide the file of tips it had received, including those it considered to be "cuckoo." RT11/25/85 at 73-81.

[3] The compiled portions of the Reporter's Transcript (RT) cited to in this filing are attached as Appendix A. Page numbers refer to the original transcript page numbers for each individual date.

*Brady*: Significance of the Withheld Evidence

To satisfy § 2244(b)(2)(B), Mr. Atwood must show that the facts underlying his *Brady* clam, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." In other words, no reasonable factfinder would have been sure, beyond a reasonable doubt, that Mr. Atwood, and not somebody else, committed the crime. This Court need not determine whether that showing has been made, but rather whether Mr. Atwood has shown "possible merit to warrant a fuller exploration by the district court." *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (*en banc*).

The case against Mr. Atwood was circumstantial, with significant weaknesses. Third-party culpability has always been an issue, with significant evidence implicating alternate suspect Annette Fries. The evidence of Fries' culpability was primarily sightings by witnesses (as it was for Atwood). Numerous people saw her, and later recognized her or described a car that matched hers as well as or better than it matched Atwood's, but there was never a way to be certain it was her.

The evidence withheld was a memorandum memorializing an anonymous tip received by law enforcement that the victim was seen in a car with a specific

license plate, which turned out to be the license plate of Fries' next-door neighbor. To the extent there has been any confusion about its significance, this evidence does something new and very important: it independently ties Fries to the case, entirely outside of the witness sightings. It does that in two ways, both compelling.

First, the spontaneous introduction of a license plate number linked to Fries strongly suggests she was connected to the tip. In the absence of any suggestion that her neighbor was actually spotted driving his own car with Hoskinson in it, the logical implication is that someone who knew him called in his car for some reason. Annette Fries was such a person, and she had a good reason to do that. By the time the anonymous tip was made, a drawing of Fries identifying her as a suspect had appeared in local media, and she had already been contacted by investigators. She was motivated to try to divert police attention. That license plate number randomly ending up in the report, completely unconnected to the fact that the owner's next-door neighbor was a prime suspect under investigation by police, is unlikely, to put it mildly.

Second, the anonymous tip is consistent with the *modus operandi* of Fries' adult son, Todd. The primary conduct constituting Todd's known criminal history, for which he has been convicted, mirrors harassment experienced by the chief

defense witness implicating Annette Fries and thus already links Todd to the case.[4] The illegally suppressed memorandum, however, reveals an additional linkage: Todd's criminal history includes regular attempts to divert police to investigate innocent third parties for his crimes, and even specifically calling in anonymous tips to accomplish that. Combining this history with the link established by the license plate strongly suggests that Fries and her son were attempting to cover up the crime. An attempt to divert police is persuasive evidence of guilt in and of itself, but this tip also serves a key linking function. While jurors could perhaps be unsure whether the woman seen by those several witnesses was in fact Fries, her independent reappearance in the case would be strongly confirmatory, thus magnifying the power of the existing evidence.

To be sure, this evidence is circumstantial. But the entire case is circumstantial. *State v. Atwood*, 171 Ariz. 576, 595 (1992) (noting the prosecution was forced to prove its case through circumstantial evidence due to the paucity of direct evidence implicating Mr. Atwood). To be entitled to full consideration of his petition, Mr. Atwood need only have some prospect of success of proving that any reasonable juror would entertain a reasonable doubt that Mr. Atwood committed

[4] Specifically, Todd was convicted of mounting a revenge intimidation campaign against dissatisfied customers of his business. The particulars of these attacks—including the threatening display of dead animal carcasses—were also perpetrated against the defense witness.

these crimes. In a circumstantial case like this, evidence confirming the involvement of a known alternate suspect is sufficiently powerful to create an undeniable reasonable doubt.

*Brady*: Evidence as a Whole

The State rehearses the evidence against Mr. Atwood presented at trial, but it ignores the current state of the evidence. This Court must consider all of the evidence now known, which includes impeachment of the State's witnesses presented at trial, new evidence strengthening the connection between Fries and the crime, and new evidence badly undercutting the evidence against Mr. Atwood. *See Cooper,* 358 F.3d at 1122 (evaluating *Brady* claim for successive application in light of both trial evidence and new evidence). The State's summary does none of that, instead dramatically overstating the strength of its evidence.

For example, the State presents as definitive its expert paint and accident reconstruction testimony connecting Mr. Atwood's car to the victim's bicycle, but it omits the fact that Mr. Atwood presented credible experts of his own who strongly rejected that conclusion. Doc. 1-3 at 12.[5] It similarly asserts Mr. Atwood was seen at De Anza Park with blood on his hands following the disappearance,

[5] Despite Mr. Atwood directly addressing the paint evidence, the State inaccurately states that he "ignores" it. Doc. 4 at 18. By contrast, the State ignores the presence of blue paint on top of the pink paint and several lay and expert witness who observed no physical damage to the bicycle, both of which undermine its theory of the pink paint's origin. Doc. 1-3 at 12-13.

but leaves out the fact that Jack McDonald, who met Mr. Atwood at De Anza Park at the time in question, testified he did not notice any blood on Mr. Atwood's body. RT2/11/1987 p.m. at 142.[6]

The State claims Mr. Atwood ignores witnesses who saw him in the area of the disappearance on the afternoon on September 17. Doc. 4 at 2, 16. To the contrary, Mr. Atwood engages with that evidence directly. He has never denied he was in the area of the disappearance, but explains he had obtained drugs from an individual in that part of town several days prior and had returned to the area for the same purpose on September 17. Doc. 1-3 at 9-10. Moreover, if sightings of Mr. Atwood and his vehicle in the vicinity of the disappearance are evidence of his guilt, the contemporaneous sightings of Fries and her vehicle in the same area at the same time must be equal evidence of *her* guilt. *Id*. at 32-35.

The State references incriminating statements Mr. Atwood allegedly made to a man named Ernest Bernsienne, but omits the through, definitive impeachment of Bernsienne.[7] Bernsienne was not credible. The State additionally references three

[6] References to transcripts are cited as "RT" followed by the transcript date. Relevant excerpts of cited transcripts are included in the appendix accompanying this filing.

[7] Bernsienne provided evasive, transparently contradictory information about his membership in an occult organization and was caught lying about his own criminal history and military service. RT3/2/1987 at 30-34, 40-48, 61-62, 64-65. Bernsienne also admitted that he previously tried to get Mr. Atwood arrested as revenge for a theft, going so far as to wear a wire on behalf of Oklahoma police in an unsuccessful attempt to set up Mr. Atwood during a drug transaction. *Id*. at 73-81.

witnesses who alleged they saw Mr. Atwood "driving toward northwest Tucson with a small child in his car's passenger's seat." Doc. 4 at 2. Yet as the Arizona Supreme Court noted, Mr. Atwood's trial counsel "stress[ed] apparent inconsistencies in" all three of these purported sightings. *Atwood*, 171 Ariz. at 612. Michael Young testified he saw Mr. Atwood's car twice, the second time with a child in the passenger seat. RT2/18/1987 A.M. at 14-20, 77-82. Yet when Young was interviewed by police days after the disappearance, he made no mention of the second sighting of Mr. Atwood or the child he saw in the car, producing those details only months later, long after Mr. Atwood had been publicly identified as a suspect and arrested. RT5/14/1986 at 114; RT5/15/1986 at 10-11. Young also testified he saw Mr. Atwood headed *south* on Romero, which is inconsistent with the State's theorized timeline of Mr. Atwood's travel. Doc 1-3 at 15-16. The window for Mr. Atwood to have committed this crime under the State's theory is sufficiently narrow that if Young really did see Mr. Atwood travelling south, as he testified, that evidence is exculpatory.

Robert McCormick testified he saw Mr. Atwood with a child in his car as they drove past him, noting the car had blue and gold California plates. RT2/18/1987 A.M. at 107, 109-10. However, the first time McCormick spoke to

---

He was also cross-examined about his romantic interest in Mr. Atwood and prior statements to police that he was "hurt and offended" when that interest was not reciprocated. RT3/3/1987 at 8-10, 31-33.

investigators, by phone on September 24, he said he did not get a good look at the driver, did not remember any details of the driver's appearance other than that it was a man, and could provide no description of the other occupant. RT2/23/1987 at 32, 34-40. He made no mention of the license plates. *Id*. at 36. He provided no description of Mr. Atwood or the victim until a second meeting with investigators a week later, after images of both had been widely publicized and McCormick had seen them on television. *Id*. at 42-44.

The third witness, Nora Wilson, testified she saw Mr. Atwood in a car accompanied by a child, then saw him again 20 minutes later, alone. RT2/19/1987 A.M. at 86-87, 90-99. But like Young and McCormick, her initial report to investigators differed from her later testimony and was inconsistent with an identification of Mr. Atwood. In her first police interview, she described the license plate of the car she saw as white (Mr. Atwood's plate was blue and yellow). RT5/14/1986 at 10. She stated the second time she saw the car, she could not see inside it at all. *Id*. at 11-12. And she provided none of the identifying information she would later rely on to identify Mr. Atwood, like Young and McCormick, describing Mr. Atwood only after his appearance was well publicized. *Id*. at 12-14. These weaknesses are especially powerful when viewed alongside the evidence implicating Fries, much of which was of a similar character.

Regarding the evidence against Fries, the State quotes from a prior district

court ruling that questioned the identifications made by Konnie Koger and other witnesses who saw the victim with Annette Fries at the Tucson Mall. Doc. 4 at 17-18, quoting *Atwood v. Schriro*, 489 F. Supp. 2d 982, 1032-33 (D. Ariz. 2007). Yet that ruling's discussion of the evidence is itself incomplete and inaccurate. For example, the ruling says none of the mall witnesses could positively identify Fries as the woman they saw on the evening of September 17. To the contrary, based on a photograph and a drive-by identification, Koger twice told police Fries looked like the woman she saw at the mall. Doc. 1-3 at 24. She confirmed this identification at trial. RT3/9/1987 Koger Excerpt at 13-15. Witnesses Sylvia Graham, Kimberly Hilbert, and Terry Pongratz all testified that the woman they saw with the girl at the mall at least somewhat resembled a photograph of Fries. RT3/6/1987 p.m. at 71, 93-94; RT3/10/1987 at 128-29. The mall witness sightings were corroborated by *at least 10* witnesses who independently recognized Fries as the woman in the composite drawing. Doc. 1-3 at 23, 38-40. And of course, Fries' reappearance in the case via the withheld tip corroborates the fact that the woman who looked so much like her was in fact Fries. The ruling also notes Pongratz gave an inaccurate description of the victim's clothes. 489 F. Supp. 2d at 1033. It omits, however, that Koger and Hilbert both positively and accurately described the girl as wearing the distinctive red, white, and blue dress the victim wore when she disappeared. Doc. 1-3 at 19, 22.

On its list of evidence it claims "was insufficient to establish reasonable doubt" at trial, the State incorrectly includes the harassment Koger experienced following her testimony for the defense. Doc. 4 at 15. Of course, the convicting jury could not have heard that exculpatory evidence, because it occurred only *after* the trial was complete. Moreover, the full significance of that harassment—which closely conformed to the M.O. of Annette Fries' son Todd—only became apparent years later, following Todd's conviction for similar conduct. Doc. 1-3 at 64.

Regarding Todd Fries' criminal conduct, the State misses the point. It tends to prove not that Todd Fries committed the murder and kidnapping, but that he helped his mother conceal it. The State also dismisses this conduct as having begun "more than 20 years" after the victim was killed. Doc. 4 at 13-14 n.6. That is wrong. While Todd's *arrest* was for conduct beginning in the late 2000s, witnesses describe a pattern of disturbing and criminal conduct spanning decades back to near the time of the disappearance.[8] Doc. 1-3 at 44-54.

[8] The State baldly asserts that Todd's pattern of conduct is not part of the "evidence as a whole" that this Court must consider. Doc. 4 at 13-14 n.6. It provides no reason *why* this evidence should be excluded from this Court's review, because no such exception exists. *See Cooper,* 358 F.3d at 1119 (confirming the Court is "not bound by the rules of admissibility"). The State additionally asserts that Mr. Atwood was not diligent in obtaining evidence from Todd's criminal trials. *Id*. However, the full relevance of that evidence—most notably, Todd's phoning in a fake tip to throw investigators off his trail—was not evident until the recent discovery of the suppressed FBI memorandum, which documented an action consistent with Todd's M.O. No amount of diligence on Mr. Atwood's part could account for the State's *Brady* violation.

Notably, the State does not dispute the evidence that the victim was buried—which Mr. Atwood could not have done on the State's timeline. Doc. 1-3 at 16-17. Nor does it dispute witnesses who accounted for Mr. Atwood's location at a time after the disappearance that was all but impossible under the State's timeline. *Id*. at 10-11, 14. Nor does the State offer facts to counter the voluminous circumstantial evidence pointing to Annette Fries, including a witnesses who placed her or her vehicle near the site of the disappearance minutes before it occurred and multiple contemporaneous reports of kidnapping attempts by a woman matching her description. *Id*. at 18-40.

The "evidence as a whole" reveals two competing narratives, both circumstantial. Weaknesses that might be less significant in a case without an alternate suspect become crucial when compared against the strength of the case against Fries. Likewise, evidence strongly implicating Fries might matter less were there a solid case against Mr. Atwood. The question for this Court is whether there is "possible merit" to Mr. Atwood's assertion that no reasonable juror could have found him guilty beyond a reasonable doubt. Given the relative strength of the two versions here, that standard is met.

Freestanding Innocence

The State first argues this claim does not exist, citing only a 1993 Supreme Court case and ignoring this Court's long history of recognizing such a claim. It

then recognizes that the reviewability of this claim is tied to the *Brady* claim, because it is the recent discovery of the *Brady* evidence that satisfies § 2244(b)(2)(B)(i)'s diligence requirement, and the current state of the evidence as a whole, which is the same no matter what claim is at issue, that satisfies § 2244(b)(2)(B)(ii). The State concludes this claim fails the test because the *Brady* claim does, but the reverse is true. The prima facie showing made for the *Brady* claim also makes a prima facie showing for this freestanding innocence claim. And of course, if this Court finds a sufficient showing on any of the claims, Mr. Atwood "may proceed upon his entire application in the district court." *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997).

Respectfully submitted: May 17, 2022

/s/ *Amy P. Knight*

JOSEPH J. PERKOVICH
Phillips Black, Inc.
PO Box 4544
New York, NY 10163
Tel: (212) 400-1660
j.perkovich@phillipsblack.org

AMY P. KNIGHT
Knight Law Firm, PC
3849 E Broadway Blvd, #288
Tucson, AZ 85716-5407
Tel: (520) 878-8849
amy@amyknightlaw.com

**CERTIFICATE OF SERVICE**

I certify that on May 17, 2022, I caused the foregoing motion to be filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Appellate CM/ECF system.

/s/ *Amy P. Knight*